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No. 87-1403

In The
Supreme Court of the United States
October Term, 1987

JAMES C. FREEMAN,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I.

Did the court below properly conclude that no double jeopardy violation occurred in this case because the offenses for which Petitioner was convicted each required proof of distinct elements that the other did not?

II.

Did the court below properly conclude that the evidence authorized the jury to find Petitioner guilty beyond a reasonable doubt?

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PART ONE
STATEMENT OF THE CASE

Petitioner, James C. Freeman, a former sheriff of Spalding County, Georgia, was indicted by the Spalding County grand jury upon six indictments containing multiple counts, charging him with either theft by taking or violation of oath by a public officer. Petitioner's wife, who served as his secretary during a portion of his term as sheriff, was charged in two separate indictments of multiple counts of theft by taking. The motion to sever the trials was denied. The trial court directed verdicts of acquittal as to Petitioner's wife on both indictments and as to Petitioner on two indictments. The jury ac-

quitted Petitioner on one indictment and found him guilty under three indictments. Specifically, Petitioner was found guilty under indictment number 9321 of 15 counts of violating his oath as a public officer in that he "did take and receive funds of Spalding County" in 15 separate amounts equal to 18 numbered commission checks from Southern Bell Telephone and Telegraph on fifteen separate dates, with these amounts "not being a part of his annual salary or fees to which he is lawfully entitled . . . ." (Trial Record 3-11). Under indictment number 9233, Petitioner was found guilty of 10 counts of theft by taking, in that Petitioner took on 10 separate dates 10 amounts of United States currency which was the property of Spalding County and taking "with the intention of depriving said owner of said property." (Trial Record 14-19). Under indictment number 9234, Petitioner was convicted of 15 counts of theft by taking in that he on 15 separate dates took 15 separate amounts of the United States currency from Spalding County "with the intention of depriving said owner of said property." (Trial Record 20-28). Under indictment number 9231, which were felony convictions, the trial court sentenced Petitioner to serve five years on count one plus restitution; a consecutive five year sentence on count two; and five years each on the remaining thirteen counts, to run concurrently to counts one and two. (Trial Record 12; Trial Transcript 770) (hereinafter designated T.). The theft by taking convictions were "all misdemeanors" because of the amounts involved. (T. 770). Under indictment number 9233, Petitioner was sentenced to serve twelve months on each of counts one through five and pay a fine on each of the five counts in the amount of $150.00. *Id.* Petitioner was also order to pay a $15.00

training fee on each of those counts. On the remaining counts under indictment number 9233, Petitioner was sentenced to twelve months each, to be probated, plus the $150.00 fine and $15.00 training fee on each count. (T. 771). Under indictment number 9234, Petitioner was sentenced to a twelve month probated sentence on each of the counts, to run concurrently, as well as pay a $150.00 fine and $15.00 training fee on each count. *Id.*

On direct appeal, the Georgia Court of Appeals rejected Petitioner's contention that the theft by taking charges under indictment number 9234 were lesser included offenses of the violations of oath by a public officer under indictment number 9231 as well as Petitioner's contention that the evidence was insufficient. *Freeman v. State,* 184 Ga. App. 678, — S.E.2d — (1987). That court affirmed Petitioner's convictions and sentences on October 16, 1987, and denied his motion for rehearing on November 2, 1987. The Supreme Court of Georgia denied certiorari on December 2, 1987. This petition for writ of certiorari seeks review of the judgment of the Supreme Court of Georgia.

A review of the facts presented at Petitioner's trial is necessary for this Court's determination of whether or not the petition for certiorari should be granted. Therefore, a summary of the evidence submitted at Petitioner's trial is presented as follows.

Petitioner, James "Butch" Freeman, became Sheriff of Spalding County on January 1, 1981. Petitioner lost a bid for re-election in November 1983 to his former employee, Richard Cantrell. (T. 196). On or about midnight December 31, 1983, the newly elected sheriff went to the

jail to assume office. (T. 197). He checked the records left behind by Petitioner. *Id.* Cantrell secured the accounting ledgers, receipt books, and also had G.B.I. agent Dan Green secure and inventory the evidence room. (T. 224). This was done pursuant to instructions he received in his training to become sheriff.

The new sheriff learned that both records and receipt books were missing and wrote to the Spalding County commissioners about locating them. (T. 199). After the commissioners responded they did not have the missing items, the new sheriff went before the grand jury in February 1984 to learn what he could about any missing records and money.

As a result of the new sheriff's appearance before the grand jury, agent Angie Miller of the Georgia Bureau of Investigation was assigned to investigate any improprieties at the Spalding County Sheriff's Department. Agent Miller contacted the local district attorney on February 27, 1985. (T. 408-409).

The investigation originally focused on missing wrecker logs, drug informant records, "pistol toter" permit records and license fees, the jail "inmates' store" records and proceeds thereof, and checks from Southern Bell. (T. 409-10). The investigation then expanded to include the Junior Deputy Program as well as money apparently not received from probation checks. *Id.*

Agent Miller learned that the Sheriff's Office had collected $5.00 per pistol permit in 1981, but Petitioner claimed that no license fees were collected until 1982. (T. 411, 421). No entry for any pistol license fee was recorded until November 1982. (T. 421).

Agent Miller also learned that only six entries were made in January-March 1981 for Southern Bell commission checks. There were no other records that the Sheriff's Department had received these checks. (T. 424-26). The back of each cancelled check, however, had a deposit date stamped on it. *Id.* Each date corresponded with deposit dates noted in the accounting ledger, but the amounts recorded in the accounting ledged did not include the Southern Bell check amounts. (T. 434-69). Petitioner explained that the Southern Bell check moneys were deposited under the "pistol toters" account. (T. 426). However, agent Miller could find no corresponding entries under the pistol fee entries in the ledger. (T. 434-69).

With regard to checks from the probation department, Agent Miller learned that these same bookkeeping principles were utilized in that the checks had been deposited into the probation account but not entered in the ledger. (T. 473-500). The ledger entries for bank deposits for the probation checks, when compared with the probation check amount, did not include the amount of the probation checks. *Id.* In other words, the checks had been negotiated but not ever recorded.

Barbara Woodle served as Petitioner's secretary/bookkeeper for his first eight months in office. (T. 311). She received and sent out checks and entered each transaction in the accounting ledger. (T. 314). Among the checks she would receive were those from Southern Bell, and she always entered these checks in the ledger. (T. 318). After three months, Ms. Woodle did not receive any Southern Bell checks. (T. 315). She never knew why. (T. 318-19).

Ms. Woodle was eventually succeeded by Petitioner's wife, who served as secretary January 1982-December 1984.

The checks to the Sheriff's Department from Southern Bell were received periodically, and the amounts varied as they represented a commission of revenue from pay telephones installed in the Spalding County jail. (T. 176-78). The Coca Cola Company also had installed a vending machine at the jail, and Petitioner would receive a percentage of the revenue through checks from the Coca Cola Company. *Id.* (T. 38-40).

Petitioner personally received the money collected for the "pistol toters" license fees, for copies of incident reports, and for liquor licenses. (T. 278-79, 285-87). Petitioner instructed Alice Leverette, the secretary for the Criminal Investigation Division, to deliver those checks directly to him as "the county got enough money as it was." (T. 279). Although Petitioner claimed he would use the money to buy shoes for deputies and flowers when needed, Barbara Woodle testified that she was unaware of any such items ever being bought with Sheriff Department funds. (T. 279; 333-34). She would take up a collection from the individual employees to buy flowers. *Id.*

Petitioner also received checks from the Probation Department. *Id.* These were for room and board as well as warrant fees. *Id.*

As part of the "inmates' store" in the jail, all money that Petitioner netted as profit or any other money arising from the selling of products at the Sheriff's Department or jail belonged to the County. (T. 391). Spalding County policy provided that any person receiving any moneys had to turn over those to the Board of Commis-

sioners at least once a month, and the Sheriff's Department was subject to this policy. (T. 386).

The jury found Petitioner guilty of fifteen counts of violation of oath by a public officer, for ten separate counts of theft by taking under indictment number 9233, and for fifteen counts of theft by taking under indictment number 9234. (T. 754-58).

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PART TWO
REASONS FOR NOT GRANTING THE WRIT

I. AS THE COURT BELOW PROPERLY CONCLUDED THAT PETITIONER WAS NOT SUBJECTED TO DOUBLE JEOPARDY BECAUSE EACH OF THE CRIMES REQUIRED PROOF OF DISTINCT ELEMENTS THAT THE OTHER DID NOT, THIS COURT SHOULD DECLINE TO GRANT CERTIORARI.

Petitioner contends that the Georgia Court of Appeals erred in concluding that Petitioner was not subjected to multiple punishments for the same offense in declining to find that the violations of an oath by a public officer conviction under indictment 9231 allegedly rested upon the same evidence as the theft by taking convictions under indictment 9234. Respondent submits that when deferring to the state's construction of the state statutes involved, the appellate court decision finding no double jeopardy violation is correct as each crime required proof of distinct elements and facts.

Petitioner was charged with violating his oath as a public officer under O.C.G.A. § 16-10-1. This code section provides as follows:

> Any public officer who willfully and intentionally violates the terms of his oath as prescribed by law shall, upon conviction thereof, be punished by imprisonment for not less than one nor more than five years.

O.C.G.A. § 16-10-1. The sheriff was required to take the following oath, which is the statutory oath administered to sheriffs in Georgia:

> I do swear that I will faithfully execute all writs, warrants, precepts, and processes directed to me as sheriff of this county, or which are directed to all sheriffs of this state, or to any other sheriff specially, which I can lawfully execute, and true returns make, and in all things well and truly, without malice or partiality, perform the duties of the office of sheriff of ..... County, during my continuance therein, and *take only my lawful fees.* So help me God.

O.C.G.A. § 15-6-4 (emphasis added). O.C.G.A. § 16-10-1 "makes penal the wilful and intentional violation of his oath by any public officer." *Beckman v. State*, 229 Ga. 327, 331, 190 S.E.2d 906 (1972). Thus, the prosecution was required to prove that Petitioner was a public officer and that he violated his oath of office.

Theft by taking is defined in Georgia as follows:

> A person commits the offense of theft by taking when he unlawfully takes or, being in lawful possession thereof, unlawfully appropriates any property of another with the intention of depriving him of the property, regardless of the manner in which the property is taken or appropriated.

O.C.G.A. § 16-8-2. "[T]he gravamen of the offense is the taking of the property of another against the will of the other." *Stull v. State*, 230 Ga. 99, 100, 196 S.E.2d 7 (1973). Theft by taking requires proof of a specific intent. *Jer-*

ome v. State, 143 Ga. App. 649, 239 S.E.2d 541 (1977). The theft by taking is completed "where there is an asportation, however slight, and although the goods are not removed from the land of the owner." *Henderson v. State*, 167 Ga. App. 808, 809, 307 S.E.2d 704 (1983).

The Double Jeopardy Clause of the Fifth Amendment protects against a second prosecution after an acquittal for the same offense, a second prosecution after conviction for the same offense, or multiple punishment for the same offense. *Ohio v. Johnson*, 467 U.S. 493, 498 (1984); *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). It is the third form of double jeopardy of which Petitioner complains in the instant case. The test for determining whether crimes are separate was established in *Blockburger v. United States*, 284 U.S. 299 (1932). This test provides as follows:

> [T]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not.

Blockburger v. United States, supra at 304. If one of two statutes requires proof of a fact that the other does not, then there is no constitutional impediment in punishing the defendant for both offenses. *Albernaz v. United States*, 450 U.S. 333 (1981).

The Georgia Court of Appeals in this case applied the essence of the *Blockburger* test, noting, "One crime is not included in the other if 'they involve proof of distinct essential elements.'" *Freeman v. State*, 184 Ga. App. at

687. The court noted that the crimes of theft by taking and violation of oath by a public officer "have distinct elements." *Id.* The court held as follows:

> The essential elements of theft charges are that appellant, while in possession of certain funds which were the property of Spalding County, unlawfully appropriated them with the intention of depriving the county of these funds. Violation of oath by a public officer requires the State to prove that appellant was a public officer and that he violated his oath of office by receiving more than his lawful fees. There is an overlapping of proof in that the violation of the oath of office was proven by the taking of funds belonging to the county which was derived from the pay phones and probation fees. Proof that appellant took these funds and used them for his own benefit establishes violation of his oath of office as well as the separate charge of theft by taking. The essential elements for each crime, however, are different. 'An accused may be prosecuted for each crime arising from the same conduct. The proscription is that he may not be convicted of more than one crime if one crime is included in the other.' *State v. Estevez*, 232 Ga. 316, 320 (206 S.E.2d 475) (1974). As one offense was not included in the other, this enumeration is without merit.

Freeman v. State, 184 Ga. App. at 678-79.

Respondent notes that this Court is bound by Georgia's construction of the two statutes in issue. *O'Brien v. Skinner*, 414 U.S. 524, 531 (1974). The fact that there was some overlapping of proof does not established a double jeopardy violation; rather, *Blockburger* is satisfied if each crime "requires proof of a fact that the other does not . . . ." *Ianelli v. United States*, 420 U.S. 770, 785 n. 17 (1975).

Respondent submits that the court below correctly concluded that both as a matter of fact and a matter of law no double jeopardy violation occurred in this case. The crime of theft by taking was completed when Petitioner failed to turn over the moneys to Spalding County, evidencing his specific intent to deprive the county of those moneys. Petitioner then violated his oath as sheriff by using those funds for his own benefit, thereby receiving more than his lawful fees in violation of his statutory oath. In that the court below properly concluded that as a matter of fact and a matter of law the two crimes in this case are separate and distinct and require proof of essential elements that the other does not, no double jeopardy violation has been shown. Thus, this Court should decline to grant certiorari for this reason.

Petitioner has also contended that the separate thefts occurring over a span of sixteen months should be viewed as one transaction. This Court has refused to adopt a "single transaction" view of the double jeopardy clause. *Garrett v. United States*, — U.S. —, 105 S.Ct. 2407, 2418 (1985). Thus, this claim does not serve as a basis for the granting of certiorari.

II. AS THE EVIDENCE AUTHORIZED THE JURY TO FIND PETITIONER GUILTY BEYOND A REASONABLE DOUBT, THIS COURT SHOULD DECLINE TO GRANT CERTIORARI ON THIS BASIS.

In his second issue presented to this Court for review, Petitioner has, in effect, asked this Court to grant certiorari simply to review the sufficiency of the evidence in this case supporting his convictions. Petitioner would

ask this Court to revisit *Jackson v. Virgina*, 443 U.S. 307 (1979), but only as applied to the facts of this case. Respondent submits that as the record amply supports the findings of the court below that the evidence satisfies the reasonable doubt standard, no basis for certiorari has been shown.

On direct appeal, the Georgia Court of Appeals found that the evidence in this case "when viewed in a light favorable to the prosecution, was sufficient for a rational trier of fact to find appellant guilty beyond a reasonable doubt." *Freeman v. State*, 184 Ga. App. at 681. The court rejected Petitioner's contention that the evidence did not show that the sheriff personally had the funds in his possession. *Freeman v. State*, 184 Ga. App. at 679-80. "Possession of money may be actual or constructive." *DeFoor v. State*, 233 Ga. 190, 192, 210 S.E.2d 707 (1974). The court noted that the essential element of specific intent to deprive the county of funds "was established though the testimony of a witness and proof that the checks received from Southern Bell and the Probation Department were deposited in the bank, but were never entered on the accounting ledger and were not received by the county." *Freeman v. State, supra.* The court further noted that there was also additional evidence that Petitioner personally utilized these funds. *Id.* The court concluded that the state sufficiently established that Petitioner had "possession of and control over the checks" in question so that the evidence was not insufficient for this reason. *Freeman v. State, supra.*

Petitioner has contended before this Court that it is *per se* unconstitutional to rely upon circumstantial evi-

dence of the corpus delecti where the stolen property is not recovered. However, this federal constitutional question was not specifically raised below in Petitioner's brief in support of the enumeration of errors and should not now be considered by this Court for the first time in the instant petition. *Cardinale v. Louisiana*, 394 U.S. 437 (1979).

Moreover, Respondent submits this allegation, even if reviewed by this Court, is without merit as "deprive" in O.C.G.A. § 16-8-2 includes "dispos[ing] of the property as to make it unlikely that the owner will recover it." O.C.G.A. § 16-8-1(1)(B). What is important to the crime of theft by taking is "proof of the description, value, and ownership of the stolen property." *State v. Ramos*, 145 Ga. App. 301, 243 S.E.2d 693 (1978). That the stolen property is not recovered is not essential to proof of the corpus delecti in Georgia. *Ware v. State*, 143 Ga. App. 663, 239 S.E.2d 552 (1977). To require that the state must recover stolen property in order to prosecute would allow a thief to avoid prosecution simply by successfully disposing of the property before criminal proceedings could arise.

The court noted that the evidence showed that "amounts equal to the Southern Bell and Probation Department payments were diverted from the county and that appellant, as sheriff, received and was responsible for all checks devilered to and received by his department." *Freeman v. State, supra.* The court concluded that the evidence was not insufficient for this reason. *Id.*

Petitioner also contended below that the evidence was insufficient to establish the identity of the perpetrator,

but the court below noted that not only was Petitioner in possession and control of the funds in his capacity as sheriff but that he had specifically directed employees to give money directly to him. *Freeman v. State, supra.* The court also concluded that the evidence regarding intent was not insufficient, simply noting that the state "provided sufficient evidence from which intent could be inferred by the jury. *Id.* Specific intent is a jury question in Georgia. *Jerome v. State, supra.*

In conclusion, the evidence in this case amply supports the conclusion of the court below that the evidence authorized the jury to find Petitioner guilty beyond a reasonable doubt. As Petitioner has not shown that a federal question was presented and wrongly decided, this Court should decline to grant certiorari on this basis.

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CONCLUSION

This Court should refuse to grant a writ of certiorari to the Supreme Court of Georgia as it is manifest that the federal questions presented to this Court for review were correctly decided under precedent of this Court and that no federal question not previously decided by this Court is presented.

Respectfully submitted,

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